STATE OF MICHIGAN

COURT OF APPEALS

MARVELL O'FLYNN,

Plaintiff-Appellant,

v

CONSUMERS ENERGY,

Defendant-Appellee.

UNPUBLISHED
July 5, 2005

No. 255561
Jackson Circuit Court
LC No. 01-003213-CZ

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Plaintiff Marvell O'Flynn appeals as of right from an order granting defendant Consumers Energy's motion for summary disposition pursuant to MCR 2.116(C)(10).[1] The trial court determined that plaintiff's racial disparate treatment claims under the Elliott-Larsen Civil Rights Act (CRA)[2] were preempted by § 301 of the federal Labor Management Relations Act (LMRA),[3] and that plaintiff failed to establish a prima facie case of racial discrimination under a

[1] Plaintiff's complaint was originally filed as part of a multi-plaintiff suit against defendant for racial discrimination. The cases were severed below, but were reconsolidated for purposes of discovery. All but four claimants settled following mediation. The claims of the four remaining plaintiffs were dismissed following discovery due to federal preemption and for failure to create an issue of material fact. The appeals of the three other remaining claimants are being considered along with that of plaintiff in Docket Nos. 253009, 253359, and 255560.

[2] MCL 37.2101 *et seq.* The relevant section of the CRA provides:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race . . . . [MCL 37.2202(1)(a).]

[3] 29 USC 185(a). This section of the LMRA provides:

(continued…)

hostile work environment theory. Although we find that the trial court improperly determined that plaintiff's disparate treatment claims under the CRA were preempted by federal law, we find that dismissal of these claims would have been appropriate pursuant to MCR 2.116(C)(10). However, we reverse the trial court's dismissal of plaintiff's hostile work environment claims, as we find that plaintiff presented sufficient evidence to create a genuine issue of material fact and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

Plaintiff, an African-American, began working for defendant in 1986 as a janitor at its Palisades Nuclear Power Plant. In 1987, plaintiff transferred into the radiation waste department and was promoted to a senior radiation waste material handler (Radwaste Handler A) in 1990. In 2000, plaintiff became a Lead Radwaste Handler. Radwaste handlers undergo more direct, frequent, and continual exposure to radiation than most other positions at the plant. The handlers rotate positions to equalize radiation exposure among the employees and must continually monitor their dosage. Due to the dangers of radiation exposure, plaintiff, along with several other radwaste handlers, applied on several occasions for posted positions in the mechanical maintenance department. These positions were not only safer, but also provided higher pay and better advancement opportunities. According to the collective bargaining agreement, defendant was required to hire qualified applicants by seniority.

In 1999, a grievance was filed when defendant posted several temporary positions for "Mechanical Repair Worker B," hired workers from outside the company, and then immediately upgraded the positions to permanent tool keepers. In 2000, plaintiff applied for and was denied a position of "Mechanical Repair Worker A." In response to a grievance regarding the filling of the repair worker position, defendant indicated that plaintiff was only qualified for a "B" level position because he lacked the requisite experience in a "B" mechanical position. Plaintiff did, however, pass the required mechanical aptitude test.[4] In 2001, plaintiff was denied a position of temporary tool keeper and denied a position of "Building Utility Worker A," which would have

(…continued)

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. [29 USC 185(a).]

Dismissal due to federal preemption should be made under MCR 2.116(C)(4); however, the trial court failed to cite this subsection.

[4] To be qualified for a position of "Mechanical Repair Worker A," an applicant must have two years experience in a lower position in the mechanical maintenance department and pass the required mechanical aptitude test. Defendant presented evidence that it may waive a requirement for employment when none of the candidates possess all of the requisite qualifications. However, when plaintiff was denied these positions, there were other candidates who did possess all of the requisite qualifications.

given him the necessary mechanical experience for future advancement. In his complaint, plaintiff alleged that defendants purposely promoted white employees into these desired positions and kept minorities in the radwaste department due to the higher level of danger and lower pay.

Plaintiff also alleged that defendant allowed for the existence of a racially hostile work environment. Plaintiff asserted that he saw racially negative graffiti in the locker rooms. He did not find it necessary to report the graffiti as other employees had already done so and it was being removed. A manager once called plaintiff, who has a muscular build, Arnold Schwarzenegger, pronouncing the name in a racially derogatory manner. Plaintiff was told that a supervisor was fired after using a racially derogatory word in front of Larry Ledesma, another plaintiff in these actions.[5] Plaintiff was also told that a radwaste department supervisor had been reprimanded for using a racially derogatory word to criticize a minority radwaste handler. Plaintiff also testified that he was aware of several incidents in which nooses were placed around the plant, although he had never seen one.[6]

Following discovery, the trial court dismissed plaintiff's claims. The court found that plaintiff's disparate treatment claims were preempted by § 301 of the LMRA as their consideration required referencing the collective bargaining agreement. The court also found that plaintiff's hostile work environment claims lacked a factual basis. Plaintiff failed to present any evidence that minority radwaste handlers were kept in that department due to the high level of radiation exposure. Furthermore, plaintiff was unable to present sufficient evidence regarding reported incidents to support his hostile work environment claim. This appeal followed.

II. Federal Preemption

We agree with plaintiff's contention that the trial court improperly dismissed his discriminatory disparate treatment claims based on the preemptive effect of § 301 of the LMRA.

> The authority of Congress to preempt state law is rooted in the Supremacy Clause of the United States Constitution. *Gibbons v Ogden*, 22 US (9 Wheat) 1; 6 L Ed 23 (1824). Whether a state claim is preempted by a federal statute "is, of course, a question of federal law." *Allis-Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). "[W]here Federal questions are involved we are bound to follow the prevailing opinions of the United States supreme court." *Harper v Brennan*, 311 Mich 489, 493; 18 NW2d 905 (1945).[7]

The Michigan Supreme Court determined in *Betty v Brooks & Perkins* that state law discrimination claims are not automatically preempted by § 301 of the LMRA. State law rights,

---

[5] This supervisor was fired following this communication.

[6] A security guard admitted to placing one such noose in the factory. He was suspended for his conduct.

[7] *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994).

which are independent of the collective bargaining agreement, are not preempted by the federal statute.[8] A right is independent if the resolution of the claim does not require interpretation of the agreement.[9] A purely factual inquiry, such as one into the conduct and motivations of the employer, requires no interpretation of the agreement.[10] However, even if portions of the collective bargaining agreement are "relevant in determining the conduct and motives of defendant, this alone would not transform plaintiff's claim into a federal contract dispute within the ambit of § 301." Not every claim tangentially related to a collective bargaining agreement is intended to be preempted by federal law; only those requiring interpretation of the agreement.[11] A race discrimination claim does not require such interpretation. The right to be free from discrimination is nonnegotiable and cannot be waived in forming a contract.[12]

Plaintiff's disparate treatment claims do not require interpretation of the collective bargaining agreement. These claims do involve defendant's implementation of certain provisions of the agreement; *i.e.* those involving seniority and the qualifications for positions within the mechanical maintenance department. Determining whether defendant discriminated against minority employees in implementing these provisions does not require interpretation of those provisions, only a factual inquiry into defendant's conduct and motives. Accordingly, the trial court improperly determined that plaintiff's disparate treatment claims were preempted by federal law.[13] However, as we find that these claims should have been dismissed pursuant to MCR 2.116(C)(10), we need not reverse the trial court's order.

III. Racial Discrimination

Plaintiff asserts that the trial court erred in concluding that defendant was entitled to summary disposition of his hostile work environment claims pursuant to MCR 2.116(C)(10). We review a trial court's determination regarding a motion for summary disposition de novo.[14] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[15] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the

---

[8] *Id.* at 278-279, quoting *Allis-Chalmers Corp v Lueck*, 471 US 202, 212-213; 105 S Ct 1904; 85 L Ed 2d 206 (1985).

[9] *Id.* at 279-280, quoting *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399, 407; 108 S Ct 1877; 100 L Ed 2d 410 (1988).

[10] *Id.*

[11] *Id.* at 287-288, quoting *Lingle*, *supra* at 409-410.

[12] *Id.* at 283-284.

[13] See, e.g., *Donajkowski v Alpena Power Co*, 219 Mich App 441; 556 NW2d 876 (1996); *Hall v Kelsey-Hayes Co*, 184 Mich App 277; 457 NW2d 143 (1990).

[14] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[15] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[16] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[17]

A. Disparate Treatment

Although the trial court did not consider whether plaintiff's disparate treatment claims should have been dismissed pursuant to MCR 2.116(C)(10), we find that plaintiff's claims would properly have been dismissed on this ground.[18] A plaintiff may prove disparate treatment by either direct or indirect evidence.[19] Absent direct evidence of discrimination, as in this case, a plaintiff must proceed under the shifting burdens of proof articulated in *McDonnell Douglas Corp v Green*.[20] To establish a prima facie case under *McDonnell Douglas*, a plaintiff must prove that: (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position for which he applied; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination.[21] If a plaintiff establishes a prima facie case, "a presumption of discrimination arises."[22] Thereafter, the defendant bears the burden of articulating a legitimate, nondiscriminatory reason for its employment decision.[23] Once the defendant articulates such a reason, the plaintiff must present evidence that the articulated reason is mere pretext.[24]

There is no dispute that, as an African-American, plaintiff is a member of a protected class and that he suffered adverse employment actions when he was denied promotion to the mechanical maintenance positions for which he applied. However, plaintiff failed to present evidence that he was qualified for these positions. Plaintiff failed to refute defendant's evidence that two years experience in a lower mechanical maintenance department position was required for these positions and that he lacked this requisite experience. The evidence presented by

---

[16] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[17] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[18] "A trial court's ruling which reaches the right result, although for the wrong reason, may be upheld on appeal." *Mulholland v DEC Internat'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

[19] *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003).

[20] *Hazle v Ford Motor Co*, 464 Mich 456, 463-464; 628 NW2d 515 (2001), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[21] *Id.* at 463.

[22] *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998).

[23] *Hazle*, *supra* at 464.

[24] *Id.* at 464-466.

plaintiff only shows his work as a radwaste handler qualifies him for a "B" position. Furthermore, plaintiff failed to establish that the adverse employment actions occurred under circumstances giving rise to an inference of racial discrimination. He failed to present any evidence that the employees selected for these positions were unqualified. We also note that white radwaste handlers who applied for the same positions were also denied promotion on the basis of lack of qualification. Accordingly, plaintiff failed to meet his burden of establishing a prima facie case of disparate treatment.

As plaintiff failed to meet his initial burden, we need not consider whether defendant articulated a legitimate, nondiscriminatory reason for its employment decisions or whether this reason was mere pretext. However, we note that defendant did articulate such a reason for its employment decision—the fact that plaintiff was not qualified for the positions for which he applied while the selected applicants were qualified. Plaintiff has presented no evidence that defendant adhered to the qualification standards for discriminatory purposes. Accordingly, even though the trial court improperly determined that plaintiff's disparate treatment claims were preempted, this error was harmless and does not require reversal.

B. Hostile Work Environment

Plaintiff asserts that the trial court improperly dismissed his claim that defendant maintains a racially hostile work environment. To establish a prima facie case of a racially hostile work environment, a plaintiff must demonstrate that: (1) he belonged to a protected group; (2) he was subjected to unwelcome communication or conduct on the basis of his race; (3) "the unwelcome . . . conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment;" and (4) the employer is responsible for the actions of its employees under the doctrine of respondeat superior.[25]

"[T]o survive summary disposition, plaintiff [must] present documentary evidence to the trial court that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances [the alleged conduct was] sufficiently severe or pervasive to create a hostile work environment."[26] "[W]hether an environment is 'hostile' can be determined by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[27] However, a plaintiff must be aware of the unwelcome communication or conduct in order to

---

[25] *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993) (alteration in original).

[26] *Id.* at 369. See also *Chambers v Trettco, Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000).

[27] *Quinto, supra* at 370 n 9, quoting *Harris v Forklift Systems, Inc*, 510 US 17, 22-23; 114 S Ct 367; 126 L Ed 2d 295 (1993).

allege that it specifically affected his work environment.[28] "A hostile work environment cannot stand as [an arbitrary barrier in the workplace] until there is some affirmative manifestation of it to the complaining party or parties, and then becomes actionable only when 'sufficiently severe and persistent to affect seriously the psychological well being' of the employees in question."[29]

We agree with plaintiff's contention that the trial court improperly failed to consider evidence presented regarding the discovery of nooses around defendant's plant and other racially negative events of which plaintiff was aware. Although plaintiff did not actually see the nooses, there is no dispute that the nooses existed and a plant-wide committee of minority workers was formed in response to the threat. The noose has a long history as a symbol of racial violence and hatred. Certainly, the continuous discovery of nooses around the plant is relevant to an African-American employee's claim that he felt subjected to racial hostility in his place of employment. Accordingly, the trial court clearly abused its discretion in declining to consider this evidence.

It is also clear that the trial court improperly dismissed plaintiff's hostile work environment claim. There is strong evidence that a racially hostile environment exists at defendant's Palisades Nuclear Power Plant. Plaintiff raised serious allegations regarding highly improper racially motivated conduct at defendant's plant. According to plaintiff's deposition testimony, he was directly affected by racial animus when he saw racial graffiti, and when he became aware that several nooses were found around the plant and that racial comments were made to and about other minority radwaste handlers by supervisory personnel on two prior occasions.[30] He was also directly subjected to such racial comments by a manager. This evidence was corroborated during discovery by the depositions and affidavits of several other claimants. This conduct and communication, if proven, would certainly be sufficiently severe or pervasive to create a hostile work environment. There is abundant evidence that plaintiff and other minority claimants worked every day in a climate where the use of racially derogative

---

[28] See, e.g., *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 317; 385 NW2d 778 (1986) ("We conclude that plaintiff cannot rely upon incidents of sexual harassment of which she was unaware to establish that she was subjected to a hostile work environment for purposes of the Elliott-Larsen Civil Rights Act."). In *Langlois*, the plaintiff learned that two other female employees had been sexually harassed by a supervisor after she reported her own single incident of harassment and the supervisor had been fired. As she was unaware of the incidents, they could not have affected her work environment. *Id.*

[29] *Id.*

[30] Although plaintiff did not actually see the nooses or hear all the racial epithets being used around the plant, these statements are not hearsay and, therefore, are admissible to establish plaintiff's hostile work environment claim. Evidence of the incidents involving nooses and racially derogatory comments merely establish the existence of these statements, and obviously not the substance of the underlying racial epithets. Similarly, in a defamation action, a plaintiff must first establish the publication of a communication, the very fact that a statement was made. The existence of that statement is the crux of the plaintiff's action. See *Colista v Thomas*, 241 Mich App 529, 538-539; 616 NW2d 249 (2000).

words and symbols of racial hatred were commonplace. In light of this evidence, plaintiff created a genuine issue of material fact that he was subjected to unwelcome communication or conduct on the basis of his race and this communication and conduct placed him in a threatening and hostile work environment.

Plaintiff also presented sufficient evidence regarding defendant's knowledge of this climate to overcome defendant's motion. To hold an employer liable under the doctrine of respondeat superior, a plaintiff must present evidence that the defendant had notice of the hostile work environment and failed to take prompt and adequate remedial action.[31] Defendant clearly had notice of the presence of racially negative graffiti in the plant as management ordered its removal. There was also evidence that defendant had notice of general race-based issues in the plant. Evidence was presented that racially derogatory comments were often made in the presence of supervisors, who either took no action or laughed. Defendant was also aware of the discovery of nooses. Defendant's investigation of one such incident resulted in the suspension of a security guard. There was also evidence that an employee-based minority advisory panel had presented their concerns regarding these incidents to plant management.

Defendant did take some action regarding these incidents and the general racial hostility in the plant; however, a factual issue remains regarding the adequacy of these measures. Defendant did implement a diversity training program. Even though the racially hostile atmosphere had existed for several years, the program was not scheduled to begin until 2003. There was evidence that supervisors took no action upon hearing racially negative comments in the plant. An armed security guard who admitted to placing a noose on plant grounds received only a short suspension. In response to the discovery of other nooses, defendant placed a non-specific sign on the fabrication shop door that "Offensive comments or actions are no joking matter." There was also evidence that other incidents were never investigated as the nooses were simply thrown away. In light of this evidence, dismissal of plaintiff's hostile work environment claim was improper.

We affirm the trial court's dismissal of plaintiff's disparate treatment claims pursuant to MCR 2.116(C)(10), rather than on grounds of federal preemption. However, we reverse the trial court's court dismissal of plaintiff's hostile work environment claims and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen

---

[31] *Chambers*, *supra* at 312-313.